SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1969

No. 418

TYRONE, INC., A VIRGINIA CORPORATION,
TRADING AS LEE ART THEATRE, and
HOWARD WILLIAM BURTNETT,
Petitioners,

v.

JAMES B. WILKINSON, COMMONWEALTH'S ATTORNEY
FOR THE CITY OF RICHMOND, VIRGINIA, and
FRANK S. DULING, CHIEF OF POLICE FOR
THE CITY OF RICHMOND, VIRGINIA,
Respondents.

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

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The Respondents in this cause respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Tyrone, Inc. etc and Howard William Burtnett in the above styled cause.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reported in 294 F. Supp.

1330 and the opinion of the United States Court of Appeals for the Fourth Circuit is in the appendix of this brief. The opinion of the Court of Appeals for the Fourth Circuit was rendered on May 6, 1969.

QUESTIONS PRESENTED

I. Does the seizure of motion picture films in violation of the First Amendment, together with the other facts of this case, entitle the petitioners to equitable relief from state court prosecution based on said seizures?

II. Did the United States Court of Appeals for the Fourth Circuit err when it imposed on petitioners the requirements of making available to the State copies of illegally seized films for use in the state court prosecution against the petitioners?

STATUTES INVOLVED

Title 42, United States Code: § 1983

> "Every person who, under color of any statute, ordinance, regulation, custody, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress."

Title 28, United States Code: § 2283

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF FACTS

This case was commenced on October 19, 1968, when several members of the Vice Squad of the Richmond Bureau of Police paid their admission into the Lee Art Theatre located at 934 West Grace Street, Richmond, Virginia, to view the motion picture "Angelique in Black Leather". After the officers viewed the movie, they reported their findings to defendant Wilkinson and requested that other persons also view the movie to determine if probable cause existed for issuance of a search warrant. An Assistant Commonwealth Attorney, accompanied by another lawyer, police officer and a magistrate, went to the Lee Art Theatre on October 21, 1968, to view the movie "Angelique in Black Leather". Upon their return from the movie, four police officers and two lawyers filed affidavits with Andrew J. Winston, a Magistrate for the City of Richmond, Virginia, stating facts establishing probable cause for the issuance of a search warrant. The Magistrate which issued the search warrant personally viewed the motion picture in question.

The search warrants were issued by Magistrate Winston and the movie "Angelique in Black Leather" was seized. The following day a criminal information was filed in the Hustings Court of the City of Richmond, charging that Tyrone, Inc. "unlawfully and knowingly did a cause to be possessed, shown and exhibited in public a lewd and obscene motion picture, to-wit, 'Angelique in Black Leather' * * *." A separate criminal information alleged that the manager of said Theatre did "unlawfully and knowingly manage a theatre, to-wit the Lee Art Theatre at 934 West Grace Street where an exhibition of an obscene motion picture by the name of 'Angelique in Black Leather' was shown and displayed to the public". The plaintiff, Howard William Burtnett, Jr., was bailed in the sum of $500.00 with surety

for his appearance in the Hustings Court of the City of Richmond, and since the other plaintiff was a corporation, no bond was required.

The plaintiff then filed motions for a *subpoena duces tecum* to compel Rappahannock Theatre, Inc. to produce the film "If He Hollers, Let Him Go" and also the motion picture "Barbarella". The Honorable Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond, refused the issuance of the requested subpoenas.

Subsequent to this the Petitioners, by counsel moved the Hustings Court for an order compelling the Respondents to return to the Petitioners the motion picture film "Angelique in Black Leather" and the previews of "The Same Gender". Judge Witt overruled this motion. The petitioners then filed in the United States District Court of the Eastern District of Virginia the complaint which is the subject matter of this litigation.

The order of the Honorable Samuel B. Witt, Jr., Judge of the Hustings Court, refusing the return of the motion picture "Angelique in Black Leather" was not appealed to the Supreme Court of Appeals of Virginia. The Hustings Court of the City of Richmond is an intermediate Court in the Commonwealth of Virginia and is not a Court of last resort in the State. The petitioners did not exhaust any further State remedies prior to filing the complaint in the United States District Court under Title 42, United States Code, Section 1983.

ARGUMENT

This is a cross appeal filed by Tyrone, Inc., a Virginia corporation, trading as Lee Art Theatre and Howard William Burtnett. The Respondents, James B. Wilkinson and Frank S. Duling, have also filed for a writ of certiorari

to the judgment of the United States Court of Appeals for the Fourth Circuit and that case is number 409, October term, 1969, and is now pending before this Honorable Court.

For the sake of brevity the argument set forth in that brief will not be restated herein. However, that brief is incorporated into this one by reference. The aforesaid brief answers the first question presented by the petitioners in this brief.

It is respectfully submitted that Title 28 of the United States Code annotated, Section 2283, gives a complete answer to the second question presented by the petitioners. The statute is clear, concise and not ambiguous. It states in clear terms that:

> "'A court of the United States may not grant an injunction to stay a proceeding in the state court except as expressly authorized by an act of Congress or where necessary in aid of its juridiction or to protect or effectuate it judgment."

There was no evidence before the District Court that an injunction to stay the State Court proceedings were necessary in aid of its jurisdiction or to protect or effectuate its judgment. The Respondent, James B. Wilkinson, only stated what in his opinion was the law as to a prior adversary hearing before the seizure of alleged obscene materials. He relied on *United States* v. *Pink,* 315 U.S. 203 at page 216, which states as follows:

> "The lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determination of other cases."

This position is supported by secondary authority in 5 A.L.R. 3rd 1226. At this time there is no ruling from the United States Supreme Court where a majority of the Jus-

tices had agreed that a prior adversary hearing was necessary before the seizure of alleged obscene materials. The affidavits that had been filed by four police officers, two lawyers reviewing the motion picture in question and the observation of the same by the Magistrate was sufficient to establish probable cause for the issuance of a search warrant in this instance.

The petitioners continually speak of bad faith on part of the Commonwealth's Attorney and the Chief of Police relative to this prosecution but the evidence falls far short of the necessary proof to establish this as a fact. The evidence is clear and convincing that the Commonwealth's Attorney and the Chief of Police acted in the utmost good faith in this prosecution and endeavored with order and regularity to follow the decisions of this Honorable Court.

In *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968) this Court in a per curiam decision set forth guide lines to be followed in the seizure of alleged obscene materials. These guide lines were as follows:

> 1. Seizure of material should not be allowed on the conclusory assertions of a single police officer. This necessarily shows that before material alleged to be obscene is seized there should be more than one person's determination of its obscenity. In the instance case, six persons filed affidavits, all of which concluded the film violated the Virginia obscenity statute and were obscene. They set out with certainty the scenes in the motion picture which made it obscene under the law and not protected material.
>
> Under the law, at this stage of the prosecution, the State only had to prove probable cause and no more. This the affidavits did. It should be noted that the affiants were responsible, honest and law abiding citizens. They made oath to facts proving probable cause. The affidavits are entitled to credibility. The allegations in the affidavits have never been denied by the petitioners.

2. In the instant case, before the search warrant was issued, the Magistrate, himself, viewed the motion picture in question to make an independent judicial determination of whether or not probable cause existed for the issuance of a search warrant.

Under these facts there can be only one reasonable conclusion reached and that is that the State acted in the utmost good faith in prosecuting a violation of a valid State law. The entire procedure used in this case was designed to focus searchingly on the question of obscenity. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

It is respectfully submitted that this case falls clearly within the doctrine announced by this Court in *Johnson* v. *Cameron*, 88 U.S. 1335. The Court held as follows:

> "But the question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption or orderly state proceedings.' *Dombrowski* v. *Pfister, supra*, at 485. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions. Appellants say that the picketing was non-obstructive, but the State claims quite the contrary, and the record is not totally devoid of support for the State's claim."

The petitioners had State remedies readily available to determine the issue of whether or not probable cause existed for the seizure of the film. They could have made a motion to suppress the evidence and obtain the speedy hearing and

if the trial judge determined that probable cause did not exist then the evidence would have been returned to the petitioners. The petitioners could have also asked for and received a speedy trial within seven days to determine the issue of whether or not the motion picture was obscene.

The United States Court of Appeals for the Fourth Circuit suggested other methods of proceedings against alleged obscene material but this would be contrary to the holding in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

In this cause, there are no special circumstances justifying the intervention of the federal courts. Turning again to *Johnson, supra,* it was held as follows:

> Appellants' case that there are "special circumstances" establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing to violate the statute, but in bad faith to harass appellants' exercise of protected expression with no intention of pressing the charges or with any expectation of obtaining convictions, but knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged. This is therefore not a case in which ". . . a federal court of equity by withdrawing the determination of guilt from state courts could rightly afford petitioner any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas* v. *City of Jeannette, supra,* at 164.
>
> We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms. See *Cox* v. *Louisiana, supra; Wright* v. *Georgia,* 373 U.S. 284; *Edwards* v. *South Carolina, supra.*

Under the foregoing authorities, Section 2283 of Title 28, U.S.C., prohibits a federal court from enjoining or abating the State criminal prosecution instituted against the Petitioners prior to the filing of the suit for injuncton. When public officials act in good faith in state prosecutions Section 1983, Title 42, U.S.C., creates no exception to this anti-injunction statute.

CONCLUSION

The prayer of the Petition for a Writ of Certiorari should be denied and the Respondents respectfully so ask.

Respectfully submitted,

JAMES B. WILKINSON
Attorney for the Commonwealth for the City of Richmond, Virginia

FRANK S. DULING
Chief of Police for the City of Richmond, Virginia

By JAMES B. WILKINSON

CERTIFICATE

I, James B. Wilkinson, do hereby certify that five copies of this reply brief were mailed to Joseph S. Bambacus, Esquire, 415 Mutual Building, Richmond, Virginia 23219, prior to the filing of this brief in Supreme Court of the United States.

JAMES B. WILKINSON

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,192

TYRONE, INC., a Virginia corporation, trading at Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

Appellees,

v.

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

Appellants.

No. 13,193

TYRONE, INC., a Virginia corporation, trading at Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

Appellants,

v.

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

Appellees.

(Argued March 7, 1969 Decided May 6, 1969).

Before, SOBELOFF, WINTER and BUTZNER, Circuit Judges.

James B. Wilkinson, Commonwealth's Attorney for the City of Richmond, Virginia, for appellants in No. 13,192 and appellees in No. 13,193; T. Wilson Hotze, Jr. and Joseph S. Bambacus for appellees in No. 13,192 and appellants in No. 13,193.

BUTZNER, Circuit Judge:

In October 1968 the defendants, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, seized the film, "Angelique in Black Leather," at the Lee Art Theatre, which is operated by the plaintiffs.[1] They had a search warrant secured upon affidavits of four police officers and two lawyers, who, along with the magistrate who issued the warrant, had all viewed the film. Subsequently, the theatre was charged with possessing and exhibiting an obscene movie.[2] The theatre in turn brought

[1] Tyrone, Inc. is the lessee of the theatre. Howard William Burtnett is its manager. For convenience the plaintiffs will be referred to as the theatre. Generally the defendants will be referred to as the Commonwealth's Attorney. The police also seized previews or fliers of another film.

[2] The prosecution was initiated under Virginia's obscenity statutes. Va. Code Ann. § 18.1-227 to -236.4 (1960). Three times previously Lee Art films have been seized and convictions obtained. The first conviction, based on a seizure in March 1966, was overturned by the United States Supreme Court in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). Another conviction, based on an August 1966 seizure, was not appealed. And a third, which followed a seizure in October 1966, is on writ of error to the Supreme Court of Appeals of Virginia. In October 1966 the police also seized, but later returned, Lee Art's projection equipment.

this action under 42 U.S.C. § 1983, alleging violation of its First, Fourth, and Fourteenth Amendment rights. The sole claim is that the Constitution required an adversary hearing to determine obscenity before the film could be seized. The thrust of the complaint is that the seizure and the threat of its repetition will result in the suppression of nonobscene material. Not at issue, therefore, are the constitutionality of Virginia's obscenity statutes or the obscenity of "Angelique."

The district court granted an injunction which required the Commonwealth's Attorney to return the film and prohibited the seizure of any other until its obscenity had been determined in an adversary hearing. The court refused, however, to enjoin the prosecution of the theatre in state court. On appeal, the Commonwealth's Attorney attacks the injunction, and the theatre seeks to expand it to include a ban on the prosecution. We enforce the injunction as written, except that we will require the theatre to make available a copy of "Angelique" for the preparation and trial of the criminal cases. *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968).

I.

In *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), the Court reversed an order for the destruction of books which had been seized on a search warrant issued by a judge who had made only an *ex parte* determination of obscenity. The books had been impounded and later condemned as obscene after an adversary hearing. In reversing, four Justices of the Supreme Court found the seizure constitutionally insufficient because there had been no adversary hearing on the issue of obscenity before the books

were confiscated.[3] This decision, we believe, is applicable to motion pictures. The First and Fourteenth Amendments protect the expression of ideas through movies, *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), and the reasons for an adversary hearing before seizure apply as strongly to them as they do to books. The hearing, of course, is not designed to facilitate the display of obscene material, for public obscenity is not constitutionally protected. *Roth* v. *United States*, 354 U.S. 476, 485 (1957); see *Stanley* v. *Georgia*, 37 U.S.L.W. 4315, 4318 (U.S. April 7, 1969) (dictum). On the contrary, as the opinion of the Court in *A Quantity of Books* makes clear, the purpose of the hearing is to safeguard against governmental suppression of nonobscene expression. With movies, as with books, "the separation of legitimate from illegitimate speech calls for sensitive tools . . . ." *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212 (1964), quoting *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

We find support in *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968), where the Seventh Circuit required a prior adversary hearing in a situation identical to ours in every significant way. The police lacked a search warrant there, but that provides no basis for distinguishing the case because the court focused on the lack of the hearing. *Metzger* included a requirement, which we find reasonable and also adopt, that the theatre deliver to the Commonwealth's Attorney, upon request, a copy of the movie for reasonable use

[3] Mr. Justice Brennan wrote the opinion of the Court in which the Chief Justice, Mr. Justice White, and Mr. Justice Goldberg joined. Mr. Justice Black and Mr. Justice Douglas concurred because, on the basis of views they had previously expressed, the Kansas statute authorizing the destruction of the books violated the First and Fourteenth Amendments. Mr. Justice Stewart concurred on the ground that the books were not hard-core pornography. Mr. Justice Harlan and Mr. Justice Clark dissented because in their view Kansas could find the books obscene and seize them without an adversary hearing.

in the preparation and trial of the charges now pending in the state court.[4]

In holding that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie, we do not imply that the hearing must be a fully matured action at law. Matters of comparable importance are often determined on an application for a preliminary injunction, after notice to the adverse party and an opportunity for him to be heard. Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957). An order to show cause why the film should not be seized as obscene presents another possibility. Va. Code Ann. § 18.1-236.3 (1960) *as amended* (Supp. 1968). But in whatever form, the proceedings must be "designed to focus searchingly on the question of obscenity." *Marcus* v. *Search Warrant*, 367 U.S. 717, 732 (1961).

II.

In assigning cross-error to the district judge's refusal to enjoin the state court prosecutions, the theatre urges that 28 U.S.C. § 2283 is not applicable.[5] This statute generally prohibits a federal court from staying proceedings in a state court. Nevertheless, the theatre argues, 42 U.S.C. § 1983[6]

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[4] We express, however, no opinion on the film's admissibility in evidence.

[5] 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[6] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

creates a statutory exception to § 2283 for the enforcement of First Amendment rights. We need not pursue this approach to the problem, for it is clear that the application for the injunction lacks equity.[7] Comity dictates denial of federal injunctive relief against state prosecutions that challenge First Amendment rights when it does not appear that the accused have "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford [the accused] any protection which they could not secure by prompt trial and appeal pursued to this court." *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943); cf. *Broyhill* v. *Morris*, ... F.2d ..... (4th Cir. 1969). On the other hand, suppression of First Amendment rights by bad faith enforcement of a statute unconstitutional on its face or as applied justifies immediate prohibition. Then the chilling effect on the full exercise of First Amendment freedoms results from the prosecution itself. Abatement need not await vindication in the criminal court. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); cf. *Zwickler* v. *Koota*, 389 U.S. 241 (1967). But here the theatre does not challenge either the constitutionality or the application of Virginia statutes forbidding the exhibition of obscene movies. Additionally, the Commonwealth's At-

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[7] The Supreme Court has expressly left open the question whether suits under 42 U.S.C. § 1983 constitute an exception to 28 U.S.C. § 2283. *Cameron* v. *Johnson*, 390 U.S. 611, 613,n.3 (1968); *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n.2 (1965). We have held that they do not. *Baines* v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965). Accord, *Goss* v. *Illinois*, 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956). *Contra*, *Cooper* v. *Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Lansry* v. *Daley*, 288 F.Supp. 200 (N.D. Ill. 1968). See also, ALI Study of the Division of Jurisdiction between State and Federal Courts § 1372(7) (Tent. Draft No. 6, 1968)

torney, the district judge found, acted in good faith when he decided that under state and federal law the film could be seized for evidentiary purposes without a prior adversary hearing.

The theatre's attack upon this finding of good faith fails to establish that it is clearly erroneous. It has not been shown that the prosecutor sought to use the seizure as a covert device for suppression of the film by delaying trial. Nor has the earlier seizure of the projection equipment been repeated. More importantly, the Commonwealth's Attorney applied for a search warrant only after the magistrate had viewed the film. And he justifies this procedure by citing *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968), in which the same parties were involved. There the Court, in voiding a search warrant issued upon a single policeman's conclusion of obscenity, observed that it was unnecessary to decide "whether the justice of the peace should have viewed the motion picture before issuing the warrant." The Commonwealth's Attorney's interpretation of this remark cannot be equated with bad faith.

In sum, we have here good faith enforcement of an obscenity statute and no constitutional challenge to that statue. The district judge properly refused to enjoin the state court prosecutions. *Cameron* v. *Johnson,* 390 U.S. 611 (1968).

III.

The Commonwealth's Attorney argues that under 28 U.S.C. § 2281 this case should have been heard by a three-judge district court.[8] The film was seized in accordance with

[8] Title 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforce-

Virginia statutes setting out procedures for the search and seizure of contraband, including obscene material. Va. Code Ann. § 19.1-83 to -87 (1960), *as amended*, (Supp. 1968). An attack on the constitutionality of the seizure must therefore, he urges, be an attack on the constitutionality of Virginia's search and seizure statutes. This is true, he says, even though the theatre in its complaint, and consistently thereafter, has carefully limited its attack to the specific seizure, without charging that any Virginia statute is unconstitutional.

We conclude, however, that a three-judge court was not required. The theatre does not contest the authority of the Commonwealth's Attorney to seize obscene films. It simply asserts that first there must be an adversary hearing to determine obscenity. Virginia's search and seizure statutes require the judge or justice issuing the warrant to be satisfied that there is reasonable cause for the search. Generally, reasonable cause can be established from an affidavit, but the judge need not accept the affidavit alone, and nothing in the statutes prohibits him from conducting an adversary hearing, as the Constitution requires.[9] When, as here, statutes would be constitutionally applied if administered properly, a single judge has jurisdiction. Cf. *Chester* v. *Kinnamon*, 276 F. Supp. 717 (D.Md. 1967).

In *Phillips* v. *United States*, 312 U.S. 246, 251 (1941),

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ment or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[9] Virginia also has established procedures—not used here—to provide an adversary hearing before seizure of motion picture films. Va. Code Ann. § 18.1-236.3 (1960), as amended, Va. Code Ann. § 18.1-236.4 (Supp. 1968).

Mr. Justice Frankfurter, holding a three-judge court unnecessary in an analogous situation wrote:

> "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.
>
> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of [28 U.S.C. § 2281]. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a 'statute,' within the meaning of [28 U.S.C. § 2281], is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness."

No. 13,192 is remanded to permit the district court to amend its injunction to make the film reasonably available to the Commonwealth's Attorney. In all other respects, the judgment is affirmed.

No. 13,193 is affirmed.